Chan Jen Chiat v Allied Granite Marble Industries Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-237-93
MOHD GHAZALI JC
27 APRIL 1994

Tort *— Nuisance — Earthworks affecting existing flow of water — Pollution and escape of water from neighbouring land — Whether actionable nuisance*

Civil Procedure *— Injunction — Interlocutory mandatory injunction — Restoration of drainage system affected by earthworks on neighbouring land — Balance of convenience — Whether damages adequate remedy*

The plaintiff had leased a piece of land on condition that it was to be used for horticulture and fishery. He constructed ponds on the land to breed worms commercially as feedmeal for fish. His source of water for the ponds was channelled from the existing drainage system which flowed through an adjacent lot belonging to the defendant. The defendant carried out earthworks on his lot in order to level the land and build a factory upon it. Excess soil from the earthworks affected the flow of water and polluted it. The defendant built a culvert to control the flow of water but it subsequently collapsed, causing water to overflow onto the plaintiff's land and into his ponds. The pollution and ensuing stagnation of water killed the worms in seven of the plaintiff's ponds, causing him to suffer loss.

The plaintiff applied for a mandatory injunction to compel the defendant to repair the drainage system so as not to interfere with the plaintiff's breeding of worms. The plaintiff alleged that the defendant had not received approval for the earthworks from the Land Office, Kulai. On the other hand, the defendant contended that: (i) the plaintiff's lot was unsuitable for breeding worms and he did not have the necessary approval for the enterprise; (ii) the authority empowered to approve the earthworks was the District Council, Kulai and, in any event, the land office had given its permission to carry out the earthworks; and (iii) any damage suffered by the plaintiff could be compensated by damages.

Held, allowing the plaintiff's application:

(1) The plaintiff was a lawful tenant of the land and, from the wording of the tenancy agreement, it could be inferred that the category of land use was agriculture. Here, the plaintiff's activities were aquaculture within the category of land use for 'agriculture' in s 5 of the National Land Code 1965 ('the Code').

(2) The earthworks carried out by the defendant was illegal as no permit for such works had been issued. The defendant could not rely on the receipt from the land office as it merely showed that he had a permit to remove earth under s 70 of the Code and had

nothing to do with earthworks under the Street, Drainage and Building Act 1974. A

(3) The defendant's activities were tantamount to an actionable nuisance. The plaintiff had made out a strong prima facie case showing a strong probability of the existence of the legal right on which he had filed a writ, ie that the earthworks had interfered with his lawful use of the land. B

(4) The balance of convenience was in the plaintiff's favour. The plaintiff would suffer irreparable injury if the injunction were not granted as 7 of the 21 ponds had been rendered unsuitable for breeding worms. The plaintiff's enterprise and livelihood would be severely affected if the worms in the remaining 14 ponds were killed and, in the event of his success, damages would not be an adequate remedy. C

[Bahasa Malaysia summary

Plaintif telah menyewa sebidang tanah atas syarat bahawa ia mesti digunakan bagi tujuan hortikultur dan perikanan. Beliau telah membina kolam di atas tanah itu untuk membiak cacing secara komersil untuk dijadikan makanan ikan. Punca air bagi kolam tersebut telah disalurkan dari sistem penyaliran yang sedia ada dan mengalir melalui suatu lot berhampiran yang dipunyai oleh defendan. Defendan telah menjalankan kerja tanah atas lotnya untuk meratakan tanah itu dan membina sebuah kilang di atasnya. Tanah yang berlebihan daripada kerja tanah itu telah menjejaskan aliran air dan mencemarkannya. Defendan telah membina sebuah pembetung untuk mengawal aliran air tetapi pembetung it kemudiannya telah runtuh, menyebabkan air melimpah ke tanah plaintif dan ke dalam kolamnya. Pencemaran dan penakungan air yang berikutan telah membunuh cacing di dalam tujuh kolam kepunyaan plaintif, dan menyebabkan beliau mengalami kerugian. D E F

Plaintif telah memohon suatu injunksi mandatori untuk memaksa defendan membaiki sistem penyaliran itu supaya tidak mengganggu plaintif dalam kegiatan pembiakan cacing itu. Plaintif mengatakan bahawa defendan tidak menerima kelulusan untuk menjalankan kerja tanah itu daripada Pejabat Tanah, Kulai. Sebaliknya, defendan menegaskan bahawa: (i) lot plaintif itu tidak sesuai untuk pembiakan cacing dan beliau tidak mempunyai kelulusan yang diperlukan untuk menjalankan usaha tersebut; (ii) pihak berkuasa yang mempunyai kuasa untuk meluluskan kerja tanah itu adalah Majlis Daerah, Kulai dan, bagaimanapun, pejabat tanah itu telahpun memberikan kebenarannya untuk menjalankan kerja tanah itu; dan (iii) sebarang kerosakan yang dialami oleh plaintif boleh dipampas dengan ganti rugi. G H

Diputuskan, membenarkan permohonan plaintif: I

(1) Plaintif adalah penyewa sah tanah itu dan, mengikut susunan kata perjanjian penyewaan itu, inferens boleh dibuat bahawa kategori kegunaan tanah itu adalah pertanian. Di sini, kegiatan

plaintif adalah akuakultur di dalam kategori kegunaan tanah untuk 'pertanian' di dalam s 5 Kanun Tanah Negara 1965 ('Kanun itu').

(2) Kerja-kerja tanah yang dijalankan oleh defendan itu menyalahi undang-undang kerana permit untuk kerja sedemikian tidak dikeluarkan. Defendan tidak boleh bergantung pada resit daripada pejabat tanah itu kerana ia hanya menunjukkan bahawa beliau mempunyai suatu permit untuk mengeluarkan tanah di bawah s 70 Kanun itu dan tidak kena-mengena dengan kerja tanah di bawah Akta Jalan, Parit dan Bangunan 1974.

(3) Kegiatan defendan merupakan suatu kacau-ganggu boleh dakwa. Plaintif telah membuktikan suatu kes prima facie yang kuat yang menunjukkan bahawa terdapat kemungkinan yang tinggi bahawa haknya di sisi undang-undang wujud, berdasarkan mana beliau telah memfailkan suatu writ, iaitu bahawa kerja tanah itu telah mengganggu kegunaan tanahnya yang sah di sisi undang-undang.

(4) Imbangan kemudahan memihak kepada plaintif. Plaintif akan mengalami kerosakan yang tidak dapat dipulihkan jikalau injunksi tersebut tidak diberikan kerana 7 daripada 21 kolam itu telah dijadikan tidak sesuai untuk pembiakan cacing. Usaha dan punca pencarian plaintif akan terjejas secara serius jika cacing di dalam 14 kolam yang tertinggal itu terbunuh dan, jika plaintif berjaya, ganti rugi tidak akan merupakan suatu remedi yang mencukupi.]

Notes

For cases on nuisance, see 12 *Mallal's Digest* (4th Ed) paras 589–612; [1991] Mallal's Digest 1967; [1993] Mallal's Digest 1293–1294.

For cases on interlocutory mandatory injunctions, see 2 *Mallal's Digest* (4th Ed) paras 1115–1119; [1992] Mallal's Digest 255.

Cases referred to

Hubbard v Vosper [1972] 2 QB 84; [1972] 1 All ER 1023; [1972] 2 WLR 389 (refd)

Ng Chen Kee & Ors v Loh Peng Kung & Anor [1993] 2 AMR 29 (folld)

Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286 (folld)

Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Development (M) Sdn Bhd [1986] 1 MLJ 412 (folld)

Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok [1975] 2 MLJ 109 (folld)

Legislation referred to

National Land Code 1965 ss 5, 52, 70

Street, Drainage and Building Act 1974 s 70A(1)

JBR Netto (*Rina Noor & Co*) for the plaintiff.

Hj Nordin bin Hussin (*Tia & Nordin*) for the defendant.

Mohd Ghazali JC: The plaintiff is the tenant of a piece of land, which measures approximately five acres, known as Lot 2704, Mukim Senai Kulai, Daerah Johor Bahru ('the said land') with effect from 1 March 1992. The tenancy agreement between the landlord and the plaintiff stipulates that the land is to be used for the purposes of horticulture and fishery. The plaintiff constructed 21 ponds upon the said land to rear and breed worms commercially to be sold as feedmeal for fish. His source of water for the ponds is channelled from the existing drainage system which flows through Lot 2704 and an adjacent lot, namely, Lot 3268 which belongs to the defendant.

Sometime in May 1992, the defendant carried out earthworks on Lot 3268 in order to level the land to build a factory upon it. Due to inadequate measures taken to prevent erosion, excess soil from the earthworks found its way into the drainage system thereby affecting the flow of water and at the same time polluting it. In the course of carrying out the earthworks, the defendant altered the drainage system and placed a culvert underneath the disposed earth to control the flow of water. The culvert was found to be ineffective and subsequently collapsed, causing the flow of water in the drainage system to be impeded as a result of which water overflowed onto the plaintiff's land and into his ponds. The pollution of the water caused by the disposed earth and the consequential stagnation of water that ensued killed the worms in seven of the plaintiff's ponds causing him to suffer loss.

The plaintiff had on several occasions requested the defendant to rectify the situation and restore the drainage system to its original form but found the defendant not to be very responsive. As the breeding of the worms in the remaining ponds was threatened, the plaintiff filed an action on 3 July 1993 by way of a writ of summons and simultaneously filed an ex parte summons-in-chambers (encl 3) for a mandatory injunction. After a few adjournments for various reasons, the application came before me on 26 March 1994. At the onset of the hearing I was informed by both counsel that the matter had been ordered by the previous judge to be heard inter partes.

Vide encl 3, the plaintiff prays for a mandatory injunction, on the usual undertaking as to damages, against the defendant to compel him to repair, restore and rectify the drainage system which had been altered as a result of the defendant's wrongful interference, so as not to interfere with or disrupt his enterprise of rearing and breeding of worms on his land. He submitted that the defendant should be compelled to do the following:

(a) repair/restore the said drainage system;

(b) remove all disposed earth from the drainage system;

(c) remove the inadequate culvert and construct a more suitable and effective culvert; and

(d) to build a retaining wall to prevent soil erosion which will affect the water in the drainage system.

The plaintiff complained that although the defendant had, on 4 September 1993 when the case came up for mention, given an oral undertaking to the

court through his counsel that he would rectify the matter by taking remedial action to widen the ditch, prevent erosion and construct a new culvert, the defendant had failed to do so up to the date of the hearing of this application.

To support his application the plaintiff produced two plans of the layout of the area showing the position of the said two lots and the position of the drainage system before and after the carrying out of the earthworks. He also produced several photographs to show the damage done to the drainage system as a result of the earthworks and the inadequate remedial actions taken by the defendant to prevent soil erosion.

The defendant filed an affidavit dated 22 August 1993 to say that the plaintiff's lot is not suitable for breeding worms and added that the methods used were not professional and that he was made to understand that the plaintiff had not received approval from the relevant authorities for carrying on his enterprise. The defendant went on to say that the existing drainage system was not properly maintained by the relevant authorities and that anyway he had spent a sum of RM20,000 to strengthen the embankment of the ditch passing through his lot to prevent soil erosion. He then alleged that the plaintiff was also responsible for polluting that part of the drainage system which flows through his lot.

In a further affidavit dated 8 March 1994, the defendant stated that there was nothing wrong with the water-flow in the drainage system and that the cause of the death of the worms was due to the plaintiff's own negligence. He also stated that he had spent RM132,000 to build a concrete embankment on his land to prevent soil erosion and produced several photographs to support his contention.

The plaintiff filed an affidavit-in-reply dated 12 March 1994 to say that the defendant had not taken any remedial action as claimed to rectify the situation and produced several current photographs to show that the water in the drainage system was still polluted due to soil erosion which was still continuing. He also produced a letter from the Land Office, Kulai which stated that the defendant had not received any approval to carry out the earthworks, neither was he given permission to alter the drainage system.

The defendant filed two further affidavits dated 18 March 1994 and 19 March 1994. In the first affidavit, the defendant stated that the Land Office, Kulai is not the relevant authority empowered to give approvals to carry out earthworks, the relevant authority being the District Council, Kulai, and furthermore, the said district council had informed the defendant that the drainage on his lot was in order and not problematic. The defendant added that anyway, any damage suffered by the plaintiff, if proven, could be compensated by way of monetary payments. In the second affidavit, the defendant stated that he had received permission from the Land Office, Kulai to carry out the earthworks and produced a copy of a receipt to show that the fee has been paid.

Based upon the above affidavits and after hearing the submissions of both counsel I have to consider whether the court should grant a mandatory

injunction on this interlocutory application. On the subject of mandatory injunction, 24 *Halsbury's Laws of England* (4th Ed) at p 533 states:

> Where the injury done to the plaintiff cannot be estimated and sufficiently compensated for by damages, or is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done, or where the injury complained of is in breach of an express agreement, the court will exercise its jurisdiction and grant a mandatory injunction, even though the expense and trouble of obeying the injunction will be far in excess of any sum which could reasonably be awarded by way of damages.

In the case of *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 at p 110, Abdoolcader J (as he then was) sets out a synopsis of the well-established principles which govern the grant or refusal of a temporary or interlocutory injunction which are as follows:

(1) whether the plaintiff has made out a strong prima facie case showing a strong probability of the existence of the legal right on which he sues and a right to the final relief claimed;

(2) whether the balance of convenience is in the plaintiff's favour and requires an injunction to protect it;

(3) whether the plaintiff will in fact suffer irreparable injury;

(4) whether the case is one in which, in the event of success in the suit, the plaintiff will not have a proper remedy in being awarded adequate damages;

(5) whether there is clear necessity for affording immediate protection to the plaintiff's alleged right or interest;

(6) the maintenance and preservation of the status quo pending the trial;

(7) an interim or interlocutory mandatory injunction is never granted before trial except in exceptional and extremely rare cases; and

(8) an injunction is a discretionary remedy granted only at the discretion of the court on the principles of equity and on a consideration of the facts and circumstances viewed in the light of the legal considerations stated above.

The above-mentioned case also refers to the judgment of Lord Denning MR in *Hubbard v Vosper* [1972] 2 QB 84; [1972] 1 All ER 1023; [1972] 2 WLR 389 where he said ([1972] 1 All ER 1023 at p 1029; [1972] 2 WLR 389 at p 396):

> In considering whether to grant an interlocutory injunction, the right course of a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done.

Based upon the above authorities I would now have to consider whether the plaintiff has made out a strong prima facie case, showing a strong probability of the existence of the legal right on which he sues and a right to the final relief claimed. I would say the reply will have to be in the affirmative. The plaintiff is a lawful tenant on Lot 2704. From the wording

A of the tenancy agreement made between the plaintiff and the owner of Lot 2704, it can be safely inferred that the category of land use for the said lot has to be 'agriculture'. There are only three categories of land use provided under the National Land Code 1965 ('the Code') (s 52) and s 5 of the Code provides '"agriculture" includes ... the breeding and keeping B of honey-bees, livestock and reptiles, and aquaculture'. The plaintiff's activities, in my opinion, are 'aquaculture' which falls under the category of land use for 'agriculture'.

From the facts adduced, it is not denied that the defendant did carry out substantial earthworks. The issue raised here is whether the defendant has received approval to carry out the earthworks. With regards to C earthworks, the Street, Drainage and Building Act 1974 provides that:

> 70A(1) No person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto.

D According to Government of Johore Gazette J PU33 dated 23 October 1976, the District Council, Kulai came into being with effect from 1 September 1979. However, there is no evidence adduced before me as to whether the two lots in question fall within the jurisdiction of the said council. Be that as it may, the defendant insisted that he has a permit from E the Land Office, Kulai to carry out earthworks on his land and in support of his claim produced a receipt from the land office. I have scrutinized the receipt and with respect to the defendant, the receipt merely show that the defendant had made payments to the Land Administrator, Johor Bahru for a permit to remove earth as provided for under s 70 of the Code and I find F that the receipt has nothing to do with earthworks as provided for under the Street, Drainage and Building Act 1974. Furthermore, the defendant had contradicted himself by stating in his affidavit dated 18 March 1994 that the Land Office, Kulai is not the authority which gives approval for earthworks and that the relevant authority is the District Council, Kulai and suddenly in another breath, vide his affidavit dated 19 March 1994, G states that he had received approval from the land office to carry out earthworks and attached a receipt from the Land Administrator, Johor Bahru to prove that the fees had been paid. In my opinion, such claim by the defendant supported by the production of the said receipt is clearly incorrect and misleading. As I have pointed out earlier, the receipt has H nothing to do with earthworks referred to in s 70A of the Street, Drainage and Building Act 1974.

The plaintiff has alleged that the earthworks was carried out by the defendant to level the land for the construction of a factory and, as the category of land use for the defendant's lot is 'agriculture', the building, I which according to the plaintiff was almost completed at the date of this hearing, was an illegal construction, and that this was tantamount to an unnatural use of the defendant's land. Section 115 of the Code provides for implied conditions affecting land subject to the category 'agriculture' and this section imposes certain restrictions on the erection of buildings on

such land. However there is no evidence before me as to the category of land use applicable to the defendant's land.

To support his application further, the plaintiff cited several authorities which included *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 and *Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Development (M) Sdn Bhd* [1986] 1 MLJ 412. In the first case mentioned above, the court found that due to the following, viz:

(i) that the appellants had carried out substantial earthworks on his land;

(ii) that as a result of substantial alterations to his land he had created a dangerous situation;

(iii) that by reason of the aforesaid there was an unnatural use of the land; and

(iv) that the appellants knew or ought to have known that it was likely to affect the natural flow of water and the previous controlled drainage,

the flooding of the respondent's land and consequential damage was directly and effectively caused by the negligent acts of the appellants and that such acts conceivably had created a nuisance.

In the *Toyo Textiles* case, which also involve two lots of land adjacent to each other, the plaintiffs' action was based on nuisance and trespass and they claimed damages caused directly by flooding and waterlogging to the plaintiffs' lot caused directly by the defendant's interference with a natural stream which flowed through both lots. The defendants were held liable. The judge said (at p 417):

> Where a defendant has acted without regard to his neighbour's rights, or has acted wantonly and quite unreasonably in relation to his neighbour, he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiffs. I have already held on the facts that the defendants here did act wantonly and unreasonably in blocking up the natural course of this stream by elevating their land without first taking into account the mutual interests of all concerned let alone obtaining the benefit of the views of those in authority as to how best the land could be developed, without causing undue damage to others.

In the case of *Ng Chen Kee & Ors v Loh Peng Kung & Anor* [1993] 2 AMR 29, where the facts were quite similar to the instant case, the plaintiffs contended that their padi land could not be cultivated as the defendants had created a nuisance by creating a new drain on their land which was adjacent to the plaintiffs' land. A mandatory injunction was also sought requiring the defendant to seal the point of exit as the plaintiffs alleged that the escape of water onto their land was a result of the wilful and wanton act of the defendants. It was held that there was a wanton creation of nuisance which injured the plaintiffs' land and the defendants' nuisance had caused substantial injury to the plaintiffs, which injury would not be adequately remedied by damages if the defendants did not take steps to prevent the water flow. The plaintiffs' claim for an injunction was allowed.

A In the instant case, it is my finding that the plaintiff has made out a strong prima facie case showing a strong probability of the existence of the legal right on which he has filed a writ, namely, that as a result of the earthworks which caused the alteration of the existing drainage system and which caused the flow of water to be affected and polluted by excess soil being disposed into the drainage, it has interfered with his lawful use of B Lot 2704. It is also my finding that the defendant's activities are tantamount to an actionable nuisance and that the defendant would be responsible as he is in possession and control of Lot 3268 from which the nuisance proceeds.

On the balance of convenience, I find that it has to be in the C plaintiff's favour as it would cause greater inconvenience to the plaintiff if the injunction is not granted. I am also of the view that the plaintiff will suffer irreparable injury if the injunction is not granted as 7 of the 21 ponds have been made unsuitable for breeding the worms due to the affected flow of water and its pollution. The plaintiff's enterprise and D livelihood will be severely affected if the worms in the remaining 14 ponds are killed and I am of the view that in the event of his success in his suit he will not have a proper remedy in being awarded adequate damages. He would of course, at the trial, have to prove that he is actually losing RM1,000 daily as claimed in his writ but it is my finding that if no remedial action is taken by the defendant at this stage the plaintiff may E have to abandon his entire commercial enterprise of breeding worms to be sold as feedmeal for fish.

It is my finding that the earthworks carried out by the defendant on Lot 3268 is illegal as there is no evidence that a permit for such works had been issued and that the said works had materially affected the right of the F plaintiff to use Lot 2704. I also find that he has created a nuisance by altering the drainage system and by allowing excess soil from the earthworks to be disposed into the drainage system thereby affecting that part of the drainage which passes through the plaintiff's lot. That being so, I allow the plaintiff's application for a mandatory injunction and accordingly make the following order and directions:

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Upon the usual undertaking by the plaintiff as to damages, that the defendant:

(i) repair/restore the said drainage system running through Lot 3268;

(ii) remove all disposed earth from the said drainage system;

H (iii) remove the inadequate culvert which had collapsed and replace it with a more suitable and effective culvert so as not to impede the water-flow of the drainage system;

(iv) to construct effective embankments to prevent soil erosion and to prevent excess soil being washed into the drainage system; and

I (v) the costs of and incidental to this application to be costs in the cause.

Application allowed.

Reported by Anne Khoo